FOR ARGUMENT

Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1978
No. 78-690

KATHLEEN R. REITER,

Petitioner,

vs.

SONOTONE CORPORATION, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the United States District Court for the District of Minnesota (Pet. App. A-2) is reported at 435 F.Supp. 933. The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. A-12) is reported at 579 F.2d 1077.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on June 19, 1978. A timely petition for rehearing *en banc* was denied on August 11, 1978. On August 28, 1978, the Eighth Circuit entered an order staying issuance of its mandate for 60 days, and the petition for certiorari was filed within that time. This Court granted the petition for certiorari on January 8, 1979. Jurisdiction is founded upon 28 U.S.C. §1254(1) (1976).

QUESTION PRESENTED

Whether a consumer who purchased a hearing aid at retail for personal use, asserting no injury to a commercial interest or enterprise, satisfies the threshold standing test of Section 4 of the Clayton Act, 15 U.S.C. §15 (1976), which requires injury to "business or property."

STATUTE INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. §15 (1976), provides in pertinent part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained. . . ."

STATEMENT OF THE CASE

On May 2, 1975, petitioner Kathleen R. Reiter commenced this purported class action for treble damages against respondents, five hearing aid manufacturers, under Section 4 of the Clayton Act, 15 U.S.C. §15 (1976).[1] Reiter seeks to represent a nationwide class of persons who, like herself, purchased hearing aids for personal use, not directly from the manufacturers, but from independent retail dealers.

In her complaint, Reiter alleges that the respondent-manufacturers violated Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, 15 U.S.C. §§ 1, 2, and 14 (1976). Reiter claims that the manufacturers restricted the territories and customers of their retail dealers, required those dealers to deal exclusively in their respective hearing aids, used their dealers' customer lists for their own purposes, prohibited non-authorized dealers from dealing in or repairing their hearing aids, and fixed the retail prices of the dealers.[2] The manufacturers filed answers denying each of Reiter's material allegations.

The manufacturers moved for judgment on the pleadings or for summary judgment in the district court. Among other things, they urged that Reiter, as a retail purchaser of hearing aids for personal use, lacked standing to sue for damages

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[1] This brief is filed on behalf of four of the five manufacturers named in the complaint. Sonotone Corporation, which ceased doing business on August 25, 1978, is not included on the brief.

[2] As is clear from a reading of the complaint, this is far more than a simple price-fixing case. Reiter's allegations mirror those made by the FTC in proceedings filed some two years before this action. In the only matter adjudicated on the merits, the Administrative Law Judge found that Beltone Electronics Corporation, a respondent herein, did not engage in price-fixing. In re Beltone Electronics Corp., FTC Docket No. 8928, Initial Decision, Sept. 2, 1976, at 88.

under Section 4 of the Clayton Act because she was not injured in her "business or property" within the meaning of the Act. The district court denied the manufacturers' motions but certified the standing issue for interlocutory review under 28 U.S.C. §1292(b) (1976). The court has taken no other action on the merits of the case or questions of class certification.

The Eighth Circuit authorized the interlocutory appeal and reversed the district court, holding that retail purchasers like Reiter are not injured in their "business or property" for purposes of Section 4.[3] The Court of Appeals found that the legislative history of Section 4 of the Clayton Act evidenced a congressional intent to accord the treble damage remedy to the small businessman, not the ordinary consumer. Moreover, in

[3] Neither the Eighth Circuit below nor the district court has yet addressed the respondents' assertion that petitioner's action is clearly barred by this Court's holding in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). Reiter was not a direct purchaser from the manufacturer-level entities which she charges with a variety of vertical antitrust violations. Instead, she purchased at the intervening dealer level.

Although the *Illinois Brick* holding and underlying rationale apply directly and forcefully to bar this case, the *Amicus* Brief for the United States cryptically volunteers a contrary view. Brief for the United States at 4, n.4 and 24. In this regard, the government's position seems to be based on the inaccurate notion that this action should be viewed essentially as a simple vertical price-fixing case. At p.24, for example, the government's brief refers to a ". . . retail price maintenance scheme." As respondents have explained, Reiter has alleged a broad panoply of vertical claims; accordingly, if this case were to continue, the dominant analytical theme applicable to Reiter's allegations at the dealer level would depend upon the "rule of reason" economic framework established by this Court in Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). This is a far cry from vertical price-fixing analysis.

This Court's decision in *Illinois Brick* was based to a significant extent on the difficulty and uncertainty involved in attempting to identify, measure, and allocate damages from alleged antitrust violations in the multi-level distribution context. In the present litigation, these problems are all present, compounded and made even more complex by the demanding economic quesions inherent in Reiter's vertical claims. Although the Eighth Circuit expressly declined to deal with the issue, *Illinois Brick* would certainly bar Reiter's indirect purchaser suit.

recognizing that Section 4 requires commercial or competitive injury, the Eighth Circuit followed the lead of this Court in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), and other courts which have concluded that the words "business or property" refer to commercial interests or enterprises.

SUMMARY OF ARGUMENT

This case involves solely a question of statutory interpretation: What was the intent of Congress in 1890 when—having rejected a proposal to extend the newly-created remedy of a private antitrust damage action to "any person injured or damnified" by an antitrust violation—it specifically limited the remedy to "any person . . . injured in his business or property"? The Eighth Circuit held that, by virtue of the "business or property" limitation, Congress did not intend to extend the treble damage remedy to individual members of the general public who purchase goods for personal consumption unrelated to their commercial interests or enterprises. That decision rests upon a substantial body of authority and should be affirmed.

Both the language and legislative history of Section 4 of the Clayton Act, 15 U.S.C. §15 (1976), indicate that the extraordinary treble damage remedy extends not to the ordinary consumer for personal use but only to those who are injured in competitive interests or enterprises. The opinion of the court below is but the latest in a long line of cases decided by this and other courts which have definitively interpreted the phrase "business or property" as being limited to interests in commercial ventures or enterprises.

Section 4 confers standing to sue for treble damages not upon "any person" but only upon those persons injured in

their "business or property". This statutory language certainly excludes *some* category of injury. If it does not, then the phrase "business or property" is mere surplusage.

Reiter and the *Amici* blithely ignore the linguistic dichotomy between the standing provisions of Section 4 and those of Section 16, 15 U.S.C. §26 (1976), the private injunctive provision of the Clayton Act. They give Section 4, with its restrictive "business or property" language, the same broad sweep as Section 16, which confers standing upon "any person" threatened with injury.

The assertion of Reiter and the *Amici* that "business or property" encompasses all pecuniary interests, i.e., that "property" means simply "money", also does violence to the statutory language. Their interpretation would render the term "business" superfluous. On the other hand, a "commercial interests" reading of the statute preserves the significance of each of the terms "business" and "property" because one may possess commercial property unconnected with his business or primary livelihood.

The legislative history of Section 4 fully supports the limitation to commercial ventures or enterprises dictated by the very language of the statute. Senator Sherman initially introduced in 1888 a bill which would have accorded relief to "any person . . . injured or damnified." *But his bill did not become the law.* The Judiciary Committee struck his broad language from the bill ultimately enacted in favor of the more limited "business or property" requirement. This was consistent with the constitutional thinking of the day on the States' power to control internal commerce and Congress' power to regulate interstate commerce under the Commerce Clause. Moreover, when in 1914 Congress incorporated Section 7 of the Sherman Act as Section 4 of the Clayton Act, it clearly

recognized that "its great purpose is to protect small business from big business". 51 Cong. Rec. 9198 (1914) (remarks of Rep. Taggart).

Apart from the clear language and legislative history of Section 4, the opinion of the court below is grounded upon this Court's conclusion in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), where this Court declared:

> "Like the lower courts that have considered the meaning of the words 'business or property', we conclude that they refer to commercial interests or enterprises." *Id.* at 264.

Numerous other federal courts, in considering the "business or property" limitation, both before and after this Court's decision in *Hawaii*, have reached the same conclusion.

This settled interpretation is premised on the basic purpose of the antitrust laws to foster and promote competition. Free and open competition indirectly benefits all segments of the economy, noncommercial as well as commercial. However, the extraordinary treble damage remedy was aimed at achieving this result by invoking the aid of those enterpreneurs whose commercial interests would be most directly affected by anti-competitive behavior — those persons injured in their "business or property". Not surprisingly, the vast majority of treble damage actions since 1890 have been initiated by plaintiffs engaged in some commercial venture or enterprise and, insofar as we are aware, for at least the first 50 years under the antitrust laws, no noncommercial consumer initiated a treble damage action.

Congress, in limiting the treble damage remedy to those injured in competitive or commercial interests, and the courts, in implementing the statute, recognized that indiscriminate expansion of the treble damage remedy could create awesome

administrative burdens which undermine effective enforcement of the antitrust laws. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). To expand now the scope of Section 4 to noncommercial purchasers would add substantial burdens to the administration of justice outweighing whatever relatively small benefits, if any, the noncommercial consuming public might receive beyond those now accruing from government enforcement actions and treble damage suits undertaken by the business community.

Existing antitrust remedies are wholly adequate to deter and penalize antitrust violators and to protect consumers at large. Civil and criminal antitrust actions by the federal and state governments, consumer actions for injunctive relief under Section 16 of the Clayton Act, and *parens patriae* and other suits by state attorneys general all comprise a potent arsenal of enforcement weapons. This well-considered enforcement scheme, and the settled limitation of Section 4 which restricts treble damage actions to persons engaged in commercial pursuits, should not now be upset. To the extent that Section 4 might ever warrant expansion, the job is for Congress, not this Court.

ARGUMENT

I. THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 4 OF THE CLAYTON ACT ESTABLISH THAT ONLY PERSONS INJURED IN COMMERCIAL INTERESTS OR ENTERPRISES HAVE STANDING TO SUE.

A. The Statutory Language Itself Limits the Category of Persons Entitled to Sue.

The plain language of Section 4 of the Clayton Act, which limits a cause of action for treble damages to "any person who shall be injured in his business or property", contains the initial key to understanding the narrow remedy provided.[4] Section 4 affords standing not to "any person" but only to those who demonstrate injury to their "business or property". Obviously, by its choice of words, Congress sought to exclude *some* category of injury. If the "business or property" limitation does not exclude simple, monetary injury to individuals like Reiter, then, in effect, "any person" has standing to sue, and the "business or property" requirement becomes meaningless.

Examination of the language in Section 16 of the Clayton Act, which provides broad injunctive relief for violations of the antitrust laws, confirms the narrow scope of Section 4. Section 16 provides that a private civil action for an injunction may be maintained by "[a]ny person, firm, corporation, or association . . . against threatened loss or damage by a violation of the antitrust laws . . . ." 15 U.S.C. §26 (1976). The

[4] "The starting point in every case involving construction of a statute is the language itself." Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring).

marked contrast between the "any person" language of Section 16 and the "business or property" limitation in Section 4 manifests the deliberate choice on the part of Congress to restrict the radical treble damage remedy to a more select group of persons. As this Court itself recognized in *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 260-62 (1972), this difference reflects that the injunctive remedy was considered less drastic and less likely to impose substantial burdens than the treble damage remedy.[5] Nevertheless, Reiter attempts in effect to give Section 4 the same broad sweep as Section 16.

Unlike Reiter's strained construction, a "commercial interest" interpretation of the "business or property" limitation in Section 4 preserves the significance of each of the statutory terms "business" and "property". One clearly sustains injury to "business" when a violation of the antitrust laws harms a commercial enterprise.[6] However, one sustains an injury to "property" if the violation harms a commercial pursuit or interest unconnected with one's business or primary livelihood. This distinction is illustrated by *Waldron v. British Petroleum*, 231 F.Supp. 72 (S.D.N.Y. 1964). In *Waldron*, the plaintiff who had procured a contract for the importation and sale of Iranian oil commenced an action for damages under the

[5] The courts have confirmed this analysis of Section 4. For example, in Tugboat Inc. v. Mobile Towing Co., 534 F.2d 1172, 1174-75 (5th Cir. 1976), the court noted the striking differences between Section 16 and Section 4, concluding that, although the general rules of standing apply to actions for injunctive relief, treble damage actions may be brought only in the case of injury to "commercial interests or enterprises". *See also* In re Multi-District Vehicle Air Pollution, M.D.L. No. 31, 481 F.2d 122, 130 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973).

[6] *See, e.g.*, Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, (1969) (television manufacture); Nichols v. Spencer Int'l Press, Inc., 371 F.2d 332 (7th Cir. 1967) (loss of employment). *See generally* Blackford, *"Business or Property" Entitled To Protection Under Section 4 of the Clayton Act*, 26 Mercer L.Rev. 737 (1975).

Clayton Act alleging that the defendants conspired to suppress and eliminate competition in Middle Eastern petroleum. The court held that plaintiff's contract constituted "property" under Section 4 of the Clayton Act, even though the evidence conclusively demonstrated that he was not then engaged in the oil "business". *Id.* at 86.

On the other hand, if, as Reiter and the *Amici* suggest, "property" means "money",[7] then the statutory term "business" becomes superfluous, in violation of elementary canons of statutory construction.[8] Equating "property" with "money" renders the term "business" unnecessary because every economic injury to business is a monetary injury. If Congress had intended to provide a treble damage remedy to everyone who had suffered a monetary injury, it could have simply provided standing to "any injured person". Only a "commercial

[7] An examination of the word "property" in the historical context in which it was used by the Congress of 1890 illustrates that it was generally understood to refer to land, wealth and large amounts of money, such as would typically be involved in commerce. The philological development of "property" demonstrates that in 1890, at the end of the Victorian Era, common usage would never have employed the word "property" in connection with a toothbrush, or shoe, or hearing aid, or a $10 bill. *See* Oxford English Dictionary, Oxford Univ. Press, N.Y., Vol. VIII 1961. This reinforces the view that the language of Section 4, when measured against the common usage of language at the critical time, requires a conclusion that "business or property" be construed as "business activity or property related to one's business". To construe this phrase as "money" or as anything of purely personal or nominal value would be to apply a connotation which would have been totally foreign to the congressmen of 1890.

[8] A statute should be interpreted so as not to render one part inoperative. Colautti v. Franklin, 99 S.Ct. 675 (1979). Each of the statutory words should be given its "separate meaning". FCC v. Pacifica Foundation, 98 S.Ct. 3026 (1978).

interest" interpretation gives vitality to each of the statutory terms "business" and "property".[9]

B. The Background of the Sherman Act Supports the Limitation on Standing to Sue for Treble Damages.

The predecessor to the treble damage provision in Section 4 of the Clayton Act was Section 7 of the Sherman Act, 26 Stat. 210 (1890).[10] Its evolution began with a bill introduced by Senator Sherman in 1888, S. 3445, 50th Cong. 1st Sess. (1888), which provided in pertinent part that:

> "[A]ll arrangements, contracts, agreements, trusts, or combinations . . . designed, or which tend, to advance the *cost to the consumer* . . . are hereby declared to be against public policy, unlawful, and void; and *any person or corporation injured or damnified* by such arrangement, contract, agreement, trust or corporation (sic) may sue for and recover in any court of the United States . . .

[9] "[T]he terms 'business or property' . . . do not encompass all pecuniary injury. . . ." Hawaii v. Standard Oil Co., 431 F.2d 1282, 1285 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972). *See also* Hamman v. United States, 267 F.Supp. 420, 432 (D. Mont. 1967), *appeal dismissed*, 399 F.2d 673 (9th Cir. 1968) (every "property" interest protected by state law not within the scope of Section 4); Broadcasters Inc. v. Morristown Broadcasting Corp., 185 F.Supp. 641, 644 (D.N.J. 1960) (the terms "business or property" are used in the ordinary sense and denote a commercial venture or enterprise); Gerli v. Silk Ass'n of America, 36 F.2d 959, 960-61 (S.D. N.Y. 1929) (loss of personal income resulting from an antitrust violation does not constitute injury to "business or property").

[10] *See* 19 Cong. Rec. 7513 (1888). *See generally* Forkosch, *Antitrust and the Consumer(Enforcement)* 32-168 (1956); 1 Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes* 8-30 (1978); Thorelli, *The Federal Antitrust Policy* 164-232 (1954).

As discussed below, Section 4 of the Clayton Act, Act of October 15, 1914, Ch. 323, §4, §8 Stat. 731, essentially reenacted Section 7 of the Sherman Act, Act of July 2, 1890, Ch. 647, §7, 26 Stat. 210. Both sections were codified at 15 U.S.C. §15. Congress repealed the duplicative Section 7 in 1955. Act of July 7, 1955, Ch. 283, §3, 69 Stat. 283.

> double the amount of damages suffered. . . ." (emphasis added)

Congress never acted upon S. 3445, and during the next session Senator Sherman introduced S. 1, 51st Cong. 1st Sess. (1889), which was virtually identical to S. 3445 and which again provided a remedy for any person "injured or damnified." *See* 21 Cong. Rec. 96 (1889). Congress referred S. 1 to the Senate Finance Committee, of which Senator Sherman was the ranking member. Although the Committee amended S. 1, the bill retained Sherman's reference to "the cost to the consumer" and the damage provision for "any person . . . injured or damnified". *See* 21 Cong. Rec. 1765 (1890).

On February 27, 1890, when the bill as amended was reported back to the Senate, Senator George from Mississippi launched a major attack upon it. One of his primary concerns was that the consumer alone would benefit from the bill. According to Senator George, the bill "leaves unpunished and perfectly lawful" those combinations which use price reductions to force competitors out of business. *Id.* at 1767. Further, in George's opinion Sherman's bill did not provide a realistic remedy to consumers. He argued that few, if any, consumer suits would ever be instituted and that not one would ever be successful. *Id.* at 1768. Senator George also believed that the bill contravened the Commerce Clause of the Constitution to the extent that it was directed at all combinations and agreements, including those which were purely intrastate. *Id.* at 1768-69.

Subsequently, Senator Sherman introduced a substitute bill which was probably intended to meet Senator George's constitutional objections, but which retained the number S. 1 as well as the reference to the "cost to the consumer" and the damage

provision for "any person . . . injured or damnified." 21 Cong. Rec. at 2455; Thorelli, *The Federal Antitrust Policy* 179 (1954). However, certain senators continued to argue against both the constitutionality of the bill and the ineffectiveness of its remedy. *See, e.g.*, 21 Cong. Rec. at 2571-72 (remarks of Sen. Hiscock and Sen. Teller).

On March 27, 1890, after several days of debate, the Senate referred S. 1 to the Committee on the Judiciary which was "notoriously hostile to the legislation [and which] turned a deaf ear to all the Senate had said and done and went its own way." Hamilton & Till, *Antitrust in Action* 11 (TNEC Monograph 16, 1940). On April 2, 1890, when the Committee reported out the bill in substantially the form in which it was ultimately enacted, the Committee had not only eliminated all references to arrangements tending "to advance the cost to the consumer" but also had limited recovery to "[a]ny person . . . injured in his business or property." This qualifying and narrowing language was later incorporated into the private damage provision which became Section 7. *See* 21 Cong. Rec. 2901 (1890).[11]

Supporters of a broad damage remedy were disappointed with the narrowness of Section 7. Senator Vest, for example, was dissatisfied because Section 7 "does not go far enough", and Senator Coke preferred Section 7 "to be in a little different form." *Id.* Senator Sherman also was clearly displeased with the Judiciary Committee version and denounced it as "totally ineffective in dealing with combinations and trusts."

[11] Authorship of Section 7 has been attributed to Senator Hoar whose sympathies, in the opinion of one author, probably were with the large trusts. *See* Forkosch, *supra*. n.10, 162-63, 169-170 (1956). In the course of debate on Sherman's bill, Senator Hoar himself cautioned against "hold[ing] out to the people false remedies or pretended cures." 21 Cong. Rec. 2568 (1890).

Letwin, *Congress and the Sherman Antitrust Law: 1887-90* 23 U. Chi. L.Rev. 221, 255 (1955), *quoting The New York Times*, April 8, 1890, at 4. Col. 4. Senator George, however, stated:

> "I regard the bill, so far as it goes, as a very good one, the best I think that can be framed under that particular power of Congress, the power over commerce, which the committee have attempted to frame a bill under." 21 Cong. Rec. 2901 (1890).

On April 8, 1890, the Senate proceeded to consider the new bill as proposed by the Judiciary Committee. Although dissatisfied with the scope of Section 7, Senator Sherman and other pro-consumer legislators apparently accepted it as the best compromise available at the time. Thus, Senator Sherman commented:

> "I shall vote for it, not as being precisely what I want, but as the best under all the circumstances that the Senate is prepared to give in this direction." 21 Cong. Rec. 3145 (1890).

Senator Vest too gave up opposition to Section 7 "in order to facilitate [the bill's] immediate passage." *Id.*

Attempts to amend Section 7 so as to resurrect a broader private right of action were unsuccessful. Senator Reagan offered an amendment to Section 7 designed to give the state courts concurrent jurisdiction over private actions. Similarly, Senator George proposed an amendment which would have allowed private plaintiffs who had been injured to unite in

a "quasi-class action".[12] *Id.* at 3145-48. Senators Hoar and Edmunds opposed the two amendments, emphasizing that the Judiciary Committee previously had rejected them, and cautioned against "a more sweeping and vigorous remedy" since Congress was "entering upon a new and untrodden field of legislation." *Id.* at 3146 (remarks of Sen. Hoar); *Id.* at 3148 (remarks of Sen. Edmunds).

As the Eighth Circuit observed below, the deliberate change in critical legislative lan_uage from Sherman's bill to Section 7 as finally enacted cannot be ignored. While the original bill arguably was meant to give a noncommercial consumer like Reiter standing to sue for damages, that bill was rejected. This action evidenced a recognition on the part of Congress that the *remedy* of damage suits by individuals injured solely in their capacity as retail purchasers for their own consumption was not workable or desirable. However, Section 7 in no way diminished the basic *object* of protecting the consumer by preserving competition. The private damage remedy was afforded only to those persons most likely to be affected significantly —those entrepreneurs injured in their "business or property" —so as to secure judicial relief and insure the integrity of the competitive process for all.

Accordingly, the respondent-manufacturers' analysis of the legislative history is wholly consistent with Professor Bork's

[12] Even Senator George's proposal was aimed at strengthening the remedy of the businessman, not the noncommercial consumer. George regarded the "crush[ing]" of "the small men engaged in competition" as "the great evil at which all this legislation ought to be directed". The purpose of his proposed amendment was to permit "these small farmers, these mechanics . . .[who] have been compelled to pay [great prices] for articles they must use to unite in the same suit." 21 Cong. Rec. 3147-48 (1890).

During the course of his argument, Senator George occasionally referred to the small farmers who purchased cotton bagging as "consumers". This type of consumer is readily distinguishable from the retail consumer like Reiter.

thesis (upon which Reiter relies at p. 13 of her brief) that "maximization of consumer welfare" was the underlying theme of the Sherman Act. *See* Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. of L. & Econ. 7 (1966).[13] As Bork observed, even among those Senators on the Judiciary Committee who believed in the promotion of consumer welfare, there was marked division on the *remedy* to be implemented. Indeed, some substitute bills contained no private relief provisions at all, while others, like Senator Sherman's, opted for a broad, private right of action.[14] In limiting recovery to those persons injured in their "business or property" the Judiciary Committee obviously embarked upon a middle road, implementing a limited treble damage remedy as the best means to protect competition and maximize consumer welfare.

The respondent-manufacturers' analysis of the legislative history is also consistent with this Court's footnote *dictum* in *Brunswick v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977), upon which Reiter and the *Amici* rely. That case involved an action by certain bowling alley operators for dam-

[13] Bork's article addresses what constitutes a violation of the Sherman Act rather than issues of standing or the meaning of "business or property".

[14] Professor Bork notes:

"Those who spoke overwhelmingly agreed with [Senator Sherman's] position on this issue [the goals of antitrust]. Disagreement was largely confined to questions of remedies and the constitutional reach of Sherman's measure. The reference to the Judiciary Committee was finally made, after having been voted down twice, because of concern with those matters. . . ." 9 J. of L. & Econ. at 45.

See 21 Cong. Rec. 2613 (1890) (bill by Senator Ingalls); 21 Cong. Rec. 2613-14 (1890) (bill by Senator Coke, which was supported by Senator Vest as "far more effective" than Sherman's bill, 21 Cong. Rec. 2570-71 (1890)); 21 Cong. Rec. 2657 (1890) (bill by Senator Gray, identical to bill previously introduced by Senator George); 9 J. of L. & Econ. at 19 n.27; *see id.* at 41 n.97 ("the difference between George's bill and Sherman's . . . lay in the remedies provided").

ages allegedly resulting from Brunswick's acquisition of competing alleys. Like most of Reiter's principal authorities, *Brunswick* was not a suit by noncommercial consumers. Neither was there any issue as to "business or property" in the case. Rather, the Court addressed only the narrow issue whether antitrust damages are available where the sole injury alleged is that competitors were continued in business, thereby denying respondents an anticipated increase in market shares. *Id.* at 484.

The Court held antitrust damages were unavailable under the circumstances presented. The footnote in question was written to support the idea that the treble damage provision was designed primarily as a remedy.[15] Nowhere does the footnote, much less the body of the Court's decision, mention the question of noncommercial consumer standing to sue, and nothing in the text of the footnote sheds any light on the meaning of "business or property".[16] Indeed, the quotation from Senator George's remarks that the damage section was a remedy for "the people of the United States as individuals", to which Justice Marshall added the phrase "especially consumers", related to the original Sherman bill, not to Section 7 as actually adopted.

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[15] The portion of footnote 10 relied on by Reiter and the *Amici* reads as follows:

"Treble damage antitrust actions were first authorized by §7 of the Sherman Act, 26 Stat. 210 (1890). The discussions of this section on the floor of the Senate indicate that it was conceived of primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers. . . ." 429 U.S. at 486.

[16] Throughout their arguments, Reiter and the *Amici* repeatedly fail to recognize that the term "consumer" by itself does not denote personal as opposed to commercial use. A consumer is one who utilizes economic goods. *Brunswick* does not support Reiter's position since it only refers to "consumers". It does not suggest that a consumer has the requisite standing if he or she is not injured in a commercial interest.

The thrust of Section 7 is clear. Congress created a right of action only for those persons involved in commercial activities. Because of their great stake, the entrepreneurs would be the ones needed to police the antitrust laws. *See* Hamilton & Till, *Antitrust in Action*, *supra*, at 82. Thus, Congress adopted a middle-of-the-road approach, rejecting both the broad right of action originally proposed by Sherman and the alternative of no private remedy at all. Congress apparently concluded that competition would be best preserved by the businessman's suit, from which the consumer for personal use would benefit indirectly. *See*, Thorelli, *The Federal Antitrust Policy*, *supra*, at 227.[17] The course of practice under the Sherman Act did not break with its history. Not one noncommercial consumer action was brought under the Sherman Act for at least 50 years.[18]

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[17] Thorelli observes:

"There can be no doubt that the Congress felt that the ultimate beneficiary in this whole process was the consumer, enjoying a continuous increase in production and commodity quality at progressively lowered prices. The immediate beneficiary legislators had in mind, however, was in all probability the small business proprietor or tradesman whose opportunities were to be safeguarded from the dangers emanating from those recently-evolving elements of business that seemed so strange, gigantic, ruthless and awe-inspiring." *The Federal Antitrust Policy*, *supra* at 227.

[18] Forkosch, *supra* n.10, at 290.

C. The Deliberate Choice of the Restrictive "Business or Property" Language was Consistent with Congress' Understanding of its Limited Constitutional Power to Regulate Commerce in 1890.

Unless the 52d Congress deliberately chose to violate the Constitution, its selection of the words "business or property" in Section 7 of the Sherman Act could not have accorded the retail consumer standing to recover treble damages. Presumably, Congress intended a constitutional enactment. Congress cannot be attributed with "an intent to defy the [Constitution], or even to come so near to doing so as to raise a serious question of constitutional law". *FTC v. American Tobacco Co.*, 264 U.S. 298, 307 (1924).

An expansive reading of Section 7 is plainly inconsistent with Congress' understanding in 1890 of its limited power to regulate intrastate commerce. Congress passed the Sherman Act under the authority of the Commerce Clause of the Constitution. In 1890 retail trade was highly localized. Transportation was limited and local stores made retail sales to local customers. Congress did not then believe it had the power to regulate such intrastate trade and commerce.

Reflective of the limited scope of the Commerce Clause at that time were the *License Tax Cases*, 5 Wall. 462, 470-471 (1867), in which this Court said:

> "Over this commerce and trade [the internal commerce and domestic trade of the States] Congress has no power of regulation nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a state is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature."

Yet another case indicating that retail trade was not considered to be interstate commerce at the time Congress enacted the Sherman Act is *Kidd v. Pearson*, 128 U.S. 1 (1888). In holding that a manufacturer of intoxicating liquors could be regulated by the State of Iowa even when the manufacturer intended to export his product to other states, this Court stated:

> "Can it be said that a refusal of a State to allow articles to be manufactured within her borders (for export) any more directly or materially affects her external commerce than does her action in *forbidding the retail within her borders of the same articles after they have left the hands of the importers?* That the latter could be done was decided years ago; and we think there is no practical difference in principal between the two cases." *Id.* at 23 (emphasis added)

This Court decided *Kidd* just two years before the limiting words "business or property" were included in Section 7 of the Sherman Act. Since retail trade was then considered within the States' power to regulate and not within the power of Congress under the Commerce Clause, a logical explanation for the addition of the words "business or property" is that they were intended to eliminate claims for damages by the retail purchaser and thus to cure the constitutional infirmities of Senator Sherman's original bill. To assume otherwise would attribute to Congress an intention which would have raised serious questions of constitutional law.

Senator George, in the course of his attack upon the constitutionality of Sherman's bill, cited among other cases that of *Kidd v. Pearson*. 21 Cong. Rec. 1767 (1890). As a member of the Judiciary Committee that inserted the words "business or property" in Section 7, Senator George thought the bill was a

good one, ". . . the best I think that can be framed under that particular power of Congress, the power over Commerce. . . . " *Id.* at 2901. Thus, George obviously felt that Section 7 was no longer constitutionally objectionable. Similarly, in explaining the new bill Senator Hoar said:

> "We have affirmed the old doctrine of the common law in respect to all interstate and international commercial transactions. . . ." Id. at 3146.

One must assume that Congress intended a constitutional statute. Therefore, the phrase "business or property" was unlikely to have been intended to give a treble damage remedy to the retail purchaser then thought beyond the ambit of the Commerce Clause.[19]

D. The Background of The Clayton Act Further Demonstrates that Congress Did Not Accord the Treble Damage Remedy to Retail Consumers.

When Congress enacted the Clayton Act in 1914, it incorporated Section 7 of the Sherman Act, with minor modifications, as Section 4 of the Clayton Act.[20] Although the Clayton Act added a new private injunctive remedy for persons threatened with loss or damage from antitrust violations, 15 U.S.C. §26 (1976), Congress did not similarly expand the category of person or kind of injury covered by the treble damage remedy. The legislative history of Section 4 of the Clayton Act confirms that, like its predecessor in the Sherman Act, it was intended to apply only to injury to commercial interests or enterprises.

[19] Admittedly, if Congress had not enacted Section 7 with the phrase "business or property" included, the courts might have denied the retail purchaser standing to sue as a matter of constitutional law. In that event, courts would subsequently have been free to eliminate the restriction as constitutional interpretation changed. Here, however, it is the intention of Congress in adding the phrase "business or property" in 1890 that is in question—not current constitutional thinking.

[20] Congress did not intend Section 4 to expand Section 7 substantively. *See* H.R. Rep. No. 627, Pt. 1, 63d Cong., 2d Sess., at 14 (1914); S. Rep. No. 698, 63d Cong., 2d Sess., at 44 (1914). *See generally* 2 Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes* 989-1025 (1978).

During the House debate, Representative Webb, a member of the Judiciary Committee, undertook "to give a running outline of the meaning and meat of each provision in this bill . . . a simple, straightforward, nontechnical statement as to . . . what the bill is and what it means." 51 Cong. Rec. 9069 (1914). He described the provisions of the present Section 4 (at that time numbered Section 5) as giving "any person who may be injured in his *business*, by reason of anything forbidden in the antitrust laws, the right to . . . recover three-fold the damages sustained, together with the cost of the suit, including a reasonable attorney's fee." *Id.* at 9073 (emphasis added). Later Representative Webb again described Section 4 as authorizing suits by a "*business man* somewhere in the United States or 40 or 50 of them. . . ." *Id.* at 16274 (emphasis added).

Other congressmen explained the meaning and scope of the treble damage remedy in terms which underscored the congressional intent to accord only the businessman a right of action. Representative Carlin, for example, commented on the provision that allows judgments in government actions to be relied upon in Section 4 actions as follows:

> "We went further in our effort to help the individual. We said, '*When you have been damaged in your business* by a combination operating in restraint of trade we are going to put you no longer to the expense of gathering the testimony and of combating the wealth of the world in order to recover your damages' ". 51 Cong. Rec. 9270 (1914) (emphasis added).

Likewise, Representative Taggart, also a member of the House Judiciary Committee through which the bill passed, emphasized that Section 4 was aimed at commercial injury:

> "A great many suits have been brought against trusts by the United States and many trusts have been dissolved. Some few have been punished, but the people whose *business* they destroyed have been practically without a remedy. When this bill becomes a law, the person who willfully destroys another person's *business* will do so at his peril.
>
> * * *
>
> "The bill is framed for the purpose of liberating business and not for the purpose of injuring or destroying any business. *Its great purpose is to protect small business from big business,* and to compel all business to be conducted honestly." 51 Cong. Rec. 9198 (1914) (emphasis added).

Similarly, Senator Reed described the impact of the treble damage remedy in these terms:

> "It follows that the Argus eyes of thousands of *business men* now being injured will be upon the powerful concerns, and the thousand arms of the courts will be employed to prevent their evil practices." 51 Cong. Rec. 12939 (1914) (emphasis added).

A similar interpretation was echoed by Representative Floyd, who referred to the provisions in the Act concerning private antitrust enforcement as follows:

> "We have taken, by these provisions, the *business public* into our confidence as allies of the Government in enforcing the antitrust laws, and given to the *business men* of the country who are being imposed upon by unlawful combinations remedies by which they can recover their own damages without waiting upon the slow and tortuous course of prosecution on the part of the Government." 51 Cong. Rec. 16319 (1914) (emphasis added).[21]

The legislative history of the antitrust laws unmistakably illustrates that, in originally providing the treble damage remedy to persons injured in their "business or property" in Sherman Act Section 7, and in incorporating that provision into Clayton Act Section 4, Congress understood that this extraordinary remedy was not extended to noncommercial consumers among the general public. Accordingly, for this Court now to include retail purchasers like Reiter within the ambit of the deliberately narrow "business or property" limitation would do violence to the history of this unique relief provision.

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[21] For the same understanding of the scope of Section 4 *see generally* the 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws; Hamilton & Till, *Antitrust In Action* 83-85 (TNEC Monograph 16, 1940); Timberlake, *Federal Damage Antitrust Actions* 20 (1965).

II. THIS COURT AND MANY FEDERAL APPELLATE COURTS, LIKE THE COURT BELOW, HAVE REPEATEDLY INTERPRETED THE PHRASE "BUSINESS OR PROPERTY" TO REQUIRE INJURY TO A COMMERCIAL INTEREST OR ENTERPRISE.

A. The Courts Generally Have Limited Standing Under Section 4.

Congress enacted the antitrust laws to preserve and promote competition—to protect the competitive process itself. *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962); *Northern Pacific Ry. v. United States*, 356 U.S. 1, 4 (1958). The primary concern of the antitrust laws is not the enrichment of private citizens or their attorneys, but rather the maintenance of an open economy for the benefit of all. The private right to maintain an action for treble damages is "purely incidental and subordinate to this primary purpose of protecting the public". *Hamman v. United States*, 267 F.Supp. 420, 431 (D.Mont. 1967), quoting *Nelligan v. Ford Motor Co.*, 161 F.Supp. 738, 741 (W.D.S. Car. 1958), *aff'd*, 262 F.2d 556 (4th Cir. 1959).

Because the private action for treble damages is an extraordinary and powerful statutory remedy, the courts have construed Section 4 narrowly.[22] This Court itself has recognized the narrow scope of this Section in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), noting that:

> "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Id.* at 262, n.14.

[22] *Accord*, Note, *Illinois Brick: The Death Knell of Ultimate Consumer Antitrust Suits*, 52 St. John's L.Rev. 421 (1978) and cases cited at n.2; Scher, *Emerging Issues Under the Antitrust Improvements Act of 1976*, 77 Colum. L.Rev. 679, 702 (1977) ns. 132, 133, and 134 and accompanying text.

Recognition of the necessity for restraints upon the private right of action under Section 4 was pointedly expressed by the Second Circuit in *SCM Corp. v. Radio Corp. of America*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969). The court there stated that Congress did not give standing to "any and every citizen who, motivated by public spirit or possibly some baser reason, would set himself up as a watchdog of business behavior." *Id.* at 171. As a result, "all claims under the Anti-Trust Acts rest upon wrongs done by the suppression of competition and must be initiated by a party whose commerce has been directly injured." *Bookout v. Schine Chain Theatres, Inc.*, 253 F.2d 292, 295 (2d Cir. 1958).

The rationale underlying the proper construction of Section 4 was amplified by the Second Circuit, in language appropriate to this action, in *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972):

> "[I]f the flood-gates were opened to permit treble damage suits by every creditor, stockholder, employee, subcontractor, or supplier of goods and services that might be affected, the lure of a treble recovery, implemented by the availability of the class suit as facilitated by the amendment of Rule 23 F.R.C.P., would result in an overkill, due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress."

That not every injury traceable to an antitrust violation is cognizable under Section 4 of the Clayton Act was again underscored by this Court's recent decision in *Illinois Brick*

Co. v. Illinois, 431 U.S. 720 (1977). Based on an evaluation of competing policy considerations, this Court in *Illinois Brick* further limited the right to bring a treble damage action to those persons who purchase directly from the alleged violators and refused to permit indirect purchasers to demonstrate a "pass-on" of alleged price overcharges. Explicitly acknowledging that its decision would deny recovery to some who may have been injured by antitrust violations,[23] this Court recognized the practical limits upon the Section 4 private right of action:

> "Permitting the use of pass-on theories under § 4 essentially would transform treble-damage actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge—from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damage suits and seriously undermine their effectiveness." *Id.* at 737.[24]

As illustrated by the foregoing cases, the limitation on Section 4 adopted by the Eighth Circuit below—that the phrase "business or property" means commercial interests or enterprises—is logically and firmly rooted in settled ideas of restricted standing. Moreover, as with the examination of legislative history of Section 4, scrutiny of those cases which have addressed, directly and indirectly, the meaning of "business

[23] *Id.* at 746.

[24] One commentator has suggested that, in addition to traditional antitrust considerations, the *Illinois Brick* decision was founded in part on the public interest in relieving the courts from the burden of protracted litigation which interfers with their availability for the dispensation of justice. Newman, *Limiting the Antitrust Damage Suit: The Emergence of a Policy Against Complex Litigation*, 23 New York L. Sch. L.Rev. 253, 269 (1977).

or property" definitively demonstrates that the treble damage remedy does not extend to consumers who have not sustained injury to commercial interests or enterprises.

B. This Court Has Definitively Construed "Business or Property" to Refer to Commercial Interests or Enterprises.

In determining that "business or property", means commercial interests or enterprises, the court below followed this Court's authoritative statement on the issue in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972).[25] There this Court ruled that a state may not sue under Section 4 for general pecuniary injury to its citizens. The issue in *Hawaii* was whether the injury for which the State sought recovery was "an injury to its 'business or property.'" 405 U.S. at 261. To resolve this issue, the Court necessarily had to define "business or property", and it did so unequivocally:

> "Like the lower courts that have considered the meaning of the words 'business or property,' we conclude that they refer to *commercial interests or enterprises*." 405 U.S. at 264 (emphasis added).

The Court held that "[w]hen the State seeks damages for injuries to its *commercial interests*, it may sue under §4." *Id.* (emphasis added). It also noted that "[t]he section gives the same right to every citizen of Hawaii with respect to any damage to business or property." *Id.* at 262-63. Thus, like the State's remedy, the citizen's remedy is limited to injuries to commercial interests or enterprises. Even the dissenting opinion of Mr. Justice Douglas repeatedly described the potential

[25] Reiter v. Sonotone Corp., 579 F.2d at 1082-83 (Pet.App. 22, 23).

plaintiffs under Section 4 as "individual entrepreneurs." *Id.* at 269, 270.

Reiter does not attempt to distinguish meaningfully *Hawaii's* conclusion that "business or property" means "commercial interests or enterprises." However, the *Amici* States argue that a consumer for personal use participates in a commercial transaction by the act of making a purchase and, thus, satisfies the "commercial interest" requirement of *Hawaii.* Brief for the States, p. 14. This argument ignores the very language of Section 4 which focuses on the plaintiffs' own commercial interests not the nature of their transactions.

C. Numerous Other Courts Have Repeatedly Recognized That "Business or Property" Refers to Commercial Interests or Enterprises.

Until very recently the lower courts had consistently interpreted Section 4 as limited to persons injured in a commercial interest or enterprise.[26] While only a handful of courts have directly addressed the issue presented in this appeal, numerous courts have dealt squarely with the meaning of

[26] The opinions cited by petitioner as contrary to the decision below were, with one exception, issued prior to the Eighth Circuit's ruling and in reliance on the district court's opinion. *See* Theophil v. Sheller-Globe Corp., 446 F.Supp. 131 (E.D.N.Y. 1978), *appeal dismissed on other grounds*; In re Ampicillin Antitrust Litigation, 1977-1 Trade Cas. ¶61,434 (D.D.C. May 17, 1977); DeGregorio v. Segal, 443 F.Supp. 1257 (E.D.Pa. 1978); In re Petroleum Products Antitrust Litigation, 1977-2 Trade Cas. ¶61,639 (C.D.Cal. Sept. 16, 1977); Rosack v. Volvo of America Corp., 1977-1 Trade Cas. ¶61,395 (Cal. Super. Ct. March 16, 1977); Brief for Petitioner, p. 5, n.5. The only exception is Kaplan v. Rolex, an unpublished Minute Order entered by a Judge of the Los Angeles Superior Court less than two months after the Eighth Circuit's *Reiter* decision. (CA000467, August 11, 1978).

"business or property". Like this Court in *Hawaii,* they too have concluded that Section 4 requires injury to commercial interests or enterprises.

The Second Circuit, for example, has flatly rejected the attempt to use Section 4 as the basis for a claim of pecuniary injury to noncommercial property. In *Bookout v. Schine Chain Theatres, Inc.,* 253 F.2d 292 (2d Cir. 1958), the court affirmed a summary judgment dismissing a complaint for various injuries allegedly arising out of a conspiracy to drive a small theatre corporation out of business. The plaintiff was the successor to the controlling stockholder of the defunct corporation. Among other injuries, the plaintiff claimed that, as part of their conspiracy, the defendants agreed to stifle the bidding at an auction for the theatre's shares. Plaintiff sought treble damages for the difference between the true value of the shares and the price paid at the allegedly rigged auction.

The court recognized that this particular claim was "quite aside from any loss [to plaintiff] as a shareholder from the injury caused to the corporation." 253 F.2d at 294. Rather it was a claim for diminution of the value of the plaintiff's own personal property. In rejecting this claim, the court, in an opinion by Judge Learned Hand, held that "the Anti-Trust Acts do not cover such losses." *Id.* The court explained its rationale as follows:

> "The action at bar will not lie because all claims under the Anti-Trust Acts rest upon wrongs done by the suppression of competition and must be initiated by a party whose commerce has been directly injured." 253 F.2d at 295.

Likewise, in *GAF Corp. v. Circle Floor Co., Inc.,* 463 F.2d 752 (2d Cir. 1972), *cert. dismissed* 413 U.S. 901 (1973), the

Second Circuit again made it clear that it is injury to competitive position in business which is crucial:

> "Not all persons who may be able to trace an economic loss to a violation of the antitrust laws can recover under those laws. . . ."
> "This court has emphasized that, to recover, the plaintiff must allege and prove that the illegal restraint of trade injured his *competitive position* in the business in which he is or was engaged. [citations omitted] . . . The general proposition underlying cases such as these is that only a person whose competitive business position was harmed by the *anticompetitive* effects of the alleged restraint of trade can maintain a treble damage action." 463 F.2d at 758-59 (emphasis in original).

The Tenth Circuit came to the same conclusion in *Reibert v. Atlantic Richfield Co.*, 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973). The *Reibert* plaintiff alleged that he had lost his job because of an anti-competitive merger. The court stated that, for him "to satisfy the business or property prerequisite, he must demonstrate that his job is a commercial venture or enterprise." 471 F.2d at 730.

Further, the Ninth Circuit in *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 (9th Cir.) *cert. denied*, 414 U.S. 1045 (1973), also reaffirmed that a private plaintiff must allege injury to a business-type venture in order to satisfy the "business or property" requirement of Section 4. In several different passages, the court made it clear that the phrases "commercial interests or enterprises" and "commercial ventures or enterprises" mean something more than a mere consumer purchase transaction in the marketplace. Referring to this Court's construction of "business or property"

in *Hawaii*, the court stated that "business or property" is "definitively limited to interests in commercial ventures or enterprises." 481 F.2d at 126. In summing up standing requirements under the "business or property" language of Section 4, the court continued:

> "To attain standing, a plaintiff must thus allege that the antitrust violation injured a *commercial enterprise* of the plaintiff in the area of the economy in which the elimination of competition occurred. *Id.* at 128 (emphasis added).

Applying this test of standing, the court held in *Air Pollution* that governmental-entity plaintiffs suing for financial losses resulting from diminution in value of, and expenditures in connection with, government property and interests had not alleged "any injury to commercial ventures or enterprises" and thus had no standing to sue under the "business or property" language of Section 4. *Id.* at 126. In contrast, the court held that crop-farmer entities, asserting damage to their crop yields as a result of the alleged conspiracy among automobile manufacturers to delay the development of air-pollution control devices, did satisfy this requirement "since a diminished crop yield, for example, would constitute injury to commercial interests." *Id.* The farmers, in other words, were engaged in the business of farming. However, the court ultimately found that their commercial activities were not within the target area against which the alleged violation was directed for purposes of the "by reason of" language of Section 4 and denied standing to them on that basis. *Id.* at 129.

In a similar vein is *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172 (5th Cir. 1976). There the court held that a union and its members had standing under Section 4 to sue a tugboat

company for conspiracy to restrain trade by obtaining low labor costs for tugboat services. In analyzing Section 4, the court recognized that the statutory language establishes "a standing requirement more demanding than that required in other types of actions", and then, following *Hawaii* concluded that "[c]learly, *the injury must be to commercial interests or enterprises.* . . ." *Id.* at 1174-75 (emphasis added).

In an earlier case, *Jeffrey v. Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975), the Fifth Circuit held that residential telephone subscribers lacked standing under Section 4 to maintain a suit based on overcharges in their home telephone rates resulting from alleged antitrust violations by the telephone company and two subsidiaries. Since the court found that plaintiffs were not within the "target area" of the alleged conspiracy, it expressly did not rule on the "business or property" issue. Significantly, however, the court expressed "serious doubts as to whether appellants have sufficiently asserted injury to their 'business or property' " and noted that plaintiffs' subscription to residential telephones would not fit within the category of commercial endeavor because residential telephones are used primarily for personal pleasure or private matters, rather than in earning a livelihood. *Id.* at 1130-31, n.2.[27]

Prior to the *Reiter* decision below the Eighth Circuit had rejected another attempt by noncommercial plaintiffs to bring an action under Section 4 in *Ragar v. J. T. Raney & Sons*, 521 F.2d 795 (8th Cir. 1975), *aff'g* 388 F.Supp. 1184 (E.D. Ark.). In that case, owners of real property sought treble damage relief from investment banking firms which allegedly conspired

[27] *See also* Buckley Towers Condominium, Inc. v. Buchwald, 533 F.2d 934, 938 (5th Cir. 1976) *cert. denied* 429 U.S. 1121 (1977) (plaintiff failed to show injury to its "business or property" defined as "commercial interests or enterprises").

to fix an unreasonably high interest rate on certain municipal bonds, thereby causing plaintiffs to pay for the interest overcharge through higher real estate taxes. The district court dismissed the complaints for lack of standing, and the court of appeals affirmed, expressly adopting the lower court's opinion. 521 F.2d at 796. The district court held that plaintiffs were barred *both* because they were not directly injured by the alleged violation and because they were not injured in their "business or property," stating that:

> "The Supreme Court of the United States has emphasized that in determining who may sue under the antitrust laws, the central inquiry is one of *competitive injury. Perkins v. Standard Oil Co.*, 395 U.S. 642, 648-49 (1969). [Emphasis in original.] Since the purpose of the antitrust laws is the 'prevention of restraints to free competition in business and commercial transactions,' Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940), *it follows that only those persons injured in their competitive positions in a business in which they are engaged should be permitted standing to sue under the Clayton Act.*" 388 F.Supp. at 1187 (emphasis added).

More recently, the Eighth Circuit reaffirmed the *Reiter* decision and again concluded that "business or property" means "commercial interests or enterprises." *Beckers v. Int'l Snowmobile Industry Ass'n*, 581 F.2d 1308 (8th Cir. 1978).[28]

[28] This same definition of "business or property" has been accepted in a long line of district court decisions. *See, e.g.*, Ware v. Trailer Mart, Inc., N.D. Ohio, No. C74-394 (Mem. Opinion and Order, May 31, 1978) (plaintiff failed "to allege any type of competitive injury due to the activities of the defendant."); Young v. Colonial Oil Co., 451 F.Supp. 360, 361 (M.D.Ga. 1978) (private treble damage action limited to "damages which harm a business enterprise."); Leeward Petroleum, Ltd. v. Mene Grande Oil Co., 415 F.Supp. 158, 167 (D.Del. 1976) (plaintiff "must establish that his

In addition to *Reiter*, the most carefully reasoned decisions on the issue of noncommercial consumer standing are a series of opinions from the district court for the Northern District of California. *Gutierrez v. E. & J. Gallo Winery Co.*, 425 F. Supp. 1221 (N.D. Cal. 1977), *appeal pending*, No. 77-1896; *Weinberg v. Federated Department Stores Inc.* 426 F.Supp. 880 (N.D. Cal. 1977), *appeal pending*, No. 77-1547; *Smith v. Toyota Motor Sales U.S.A., Inc.*, Civ. No. C-75-0727 S.W. (N.D. Cal. Jan. 11, 1977), *appeal pending*, No. 77-1849, *et al.* In each of these cases, the plaintiffs were noncommercial consumers who alleged that the various defendants had violated the antitrust laws. Although the factual circumstances are somewhat different in each case, the court applied the same reasoning in dismissing each complaint on the basis that the plaintiffs were without standing to sue under Section 4 since they could allege no injury to "business or property."[29]

In ruling on the various defendants' motions to dismiss for lack of standing, the court considered the legislative history of

injury is by its nature different from the general public's and is directly related to his ability to carry on his business"); Freeman v. Eastman-Whipstock, Inc., 390 F.Supp. 685, 688 (S.D. Tex. 1975) (standing accorded only to those with "distinct commercial interests or enterprises"); Bowen v. Wohl Shoe Co., 389 F.Supp. 572, 578 (S.D. Tex. 1975) (the term "refers to commercial interests or enterprises"); Hamman v. United States, 267 F.Supp. 420, 432 (D. Mont. 1967), *appeal dismissed*, 399 F.2d 673 (9th Cir. 1968) (the term "denotes a commercial venture or enterprise"); Broadcasters, Inc. v. Morristown Broadcasting Corp., 185 F.Supp. 641 (D.N.J. 1960) (same).

"It has been held consistently that the Section 4 requirement of injury to 'business or property' contemplates pecuniary damages to some commercial interest." Note, *Standing to Sue Under Section 4 of the Clayton Act*, 35 Ohio St. L.J. 723, 727 (1974). *See also*, Timberlake, *The Legal Injury Requirements and Proof of Damages in Treble Damage Actions Under the Antitrust Laws*, 30 Geo. Wash. L.Rev. 231, 233 (1961).

[29] The three decisions of the district court have been appealed to the Ninth Circuit. Arguments were held in December, 1978, and January, 1979, but in all cases the appellate court has withheld submission pending decision of the instant matter by this Court.

the Sherman and Clayton Acts in detail[30] and examined previous judicial constructions of the "business or property" limitation, which "have uniformly interpreted congressional intent as requiring a commercial nexus". *Gutierrez*, 425 F.Supp. at 1224; *Weinberg*, 426 F.Supp. at 883. Relying upon this Court's opinion in *Hawaii* and the Ninth Circuit's decision in *In re Multidistrict Vehicle Air Pollution*,[31] the court stated:

> "[I]t is apparent that consumers not claiming injury to any business or commercial interest lack standing to maintain an antitrust action for their injuries. The phrase *business or property* cannot be read to encompass injuries to pure business interests and also to pure property interests, in the disjunctive. The phrase is a conjunctive reference to interests of a business nature." *Gutierrez*, 425 F.Supp. at 1225; *Weinberg*, 426 F.Supp. at 884 (emphasis in original).

The court concluded that an injury to a plaintiff's pocketbook was not an injury to a sufficient commercial interest to satisfy Section 4 and that a plaintiff must show an injury to a competitive interest in order to have standing to sue for a violation of the antitrust laws.

The foregoing line of cases consistently and forcefully demonstrates that a consumer for personal use suffers no cogniz-

[30] The Court noted that numerous references to the Congressional Record "indicate that in 1890 Congress was well aware of the fact that the new law would afford no remedy for the average consumer." *Gutierrez*, 425 F.Supp. at 1223; *Weinberg*, 426 F. Supp. at 882, *citing* 21 Cong. Rec. 2569 (1890) (Senator Sherman); *Id.* at 2610 (Senator Morgan); *Id.* at 2615 (Senator Coke); *Id.* at 3150 (Senator George). The district court also cited Congress' preoccupation with providing remedies for the injured businessman as evidence "that the 'business or property' language was meant to encompass injuries to businesses rather than to individuals." *Gutierrez*, 425 F.Supp. at 1224; *Weinberg*, 426 F. Supp. at 883.

[31] 481 F.2d 122 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973).

able injury to "business or property" within the meaning of Section 4 of the Clayton Act. Unlike the businessman, the ordinary retail consumer like Reiter can allege no injury to competitive, commercial interests.

D. Cases Cited in Support of Reiter's Argument Are Inapplicable to the Narrow Question Before This Court.

The cases upon which Reiter and the *Amici* rely most heavily do not confront the issue whether a consumer for personal use, who asserts no injury to a commercial interest or enterprise, is injured in her "business or property" within the meaning of Section 4 of the Clayton Act. In fact, most of the cases cited in support of Reiter's attempt to expand the scope of Section 4 never even discuss the meaning of "business or property".

The apparent linchpin of Reiter's appeal is a case which, to the limited extent it even bears upon the meaning of the phrase "business or property", supports the respondent-manufacturers, not Reiter. *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906). That case did not involve a retail consumer transaction but rather a sale of iron pipe to a municipal corporation, acting in its proprietary capacity, for use in the city's waterworks system. Therefore, this Court did not face the issue whether an individual claiming injury to noncommercial property is entitled to sue for treble damages under Section 4.

This Court in *Chattanooga* acknowledged that "the main question of the case" was the applicable statute of limitations. However, in discussing whether the municipality was injured in its commercial property when allegedly victimized by price fixing, the Court noted that "the City was . . . injured in its

property . . . if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his property." *Id.* at 396. Reiter and the *Amici* attempt to extrapolate from this statement that "property" means "money" so as to extend standing under Section 4 to the ordinary consumer at retail. But *Chattanooga* does not define the term "property", and the only category of property involved in the case was commercial in nature—pipe used in the City's "business of furnishing water." *Id.* at 396.[32] *Chattanooga* hardly controls here.

Reiter and the *Amici* compound their strained reading of *Chattanooga* with the curious notion that, because the city was injured in its capacity as a "consumer" buying pipe, the rationale of the case perforce extends to the "consumer" purchasing at retail for personal use. Brief for the United States at 11. *But see* Forkosch, *Antitrust and the Consumer (Enforcement)*, *supra*, at 299 ("the case is not direct authority for the principle that a consumer's interests may be made the subject for a suit by him for treble damages"). The myriad differences —economic, social, and political—between the governmental "consumer" and the individual "consumer" for personal use betray this logic. To suggest that Reiter and the City of Atlanta (or, for that matter, the United States) stand on the same footing for purposes of Section 4 in the Clayton Act is nonsense.

This Court's opinion in *Hawaii v. Standard Oil* puts *Chattanooga's* real import into perspective. In concluding that

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[32] The lower court opinion in *Chattanooga* indicates that the city was "furnish[ing] water to consumers, charging for same precisely as would a private corporation engaged in a like business." City of Atlanta v. Chattanooga Foundry & Pipe Works, 127 F. 23, 25 (6th Cir. 1903).

"business or property" refers to "commercial interests or enterprises", *Hawaii* declared that a State can sue under Section 4 for injury to its commercial interests, citing *Chattanooga*. 405 U.S. at 262-63, and n.14. Accordingly, *Chattanooga* in no way expands the category of property covered by Section 4 to the noncommercial. That case merely defined one kind of injury to commercial property[33] and was so understood by its contemporaries.[34]

Apart from *Chattanooga*, Reiter and the *Amici* rely on *dicta* from a number of other decisions by this Court which did not address the meaning of "business or property", much less the issue on this appeal.[35] Reiter and the *Amici* apparently contend that these cases lend some kind of inferential or *sub silentio*

[33] *See* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 489-90 (1968) ("when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of the injury and damage within the meaning of §4"), citing *Chattanooga* and Thomsen v. Cayser, 243 U.S. 66, 88 (1917) ("the excess over what was reasonable was an element of injury"). *See also* Hawaii v. Standard Oil Co., 405 U.S. at 262 n.14 ("damages are established by the amount of the overcharge", citing *Chattanooga*); Donovan & Irvine, *Proof of Damages Under the Antitrust Law*, 88 U. Pa. L.Rev. 511, 512, 517 (1940) (among the accepted measures of antitrust damages is an increased "cost of doing business," citing *Chattanooga*).

[34] *See* United Copper Securities Co. v. Amalgamated Copper Co., 232 F. 574 (2d Cir. 1916) (the person injured must be engaged in a business directly, citing *Chattanooga*).

[35] *See e.g.*, Pfizer, Inc. v. Government of India, 434 U.S. 308, 313-14 (1978) (standing to sue accorded foreign government); Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc., 429 U.S. 477 (1977) (treble damages unavailable where sole injury is denial of anticipated increase in market shares); Goldfarb v. Virginia State Bar, 421 U.S. 733 (1975) (price-fixed attorney fee schedules held unlawful); Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948) (price-fixing by sugar beet refiners affects interstate commerce); Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 489-490 (1968) (elimination of passing-on defense). Brief for Petitioner at 8-9; Brief for the United States at 19-21; Brief for the States at 11-13.

support to their claims merely because the word "consumer" sometimes appears in them.

Reiter and the *Amici* also seem to have overlooked the principle that "a question not raised by counsel or discussed in the opinion of the court has [not] been decided merely because it existed in the record and might have been raised and considered." *United States v. Mitchell*, 271 U.S. 9, 14 (1926). The principal case in this regard is *Webster v. Fall*, 266 U.S. 507 (1925), in which this Court declined to reach the merits of plaintiff's suit on the ground of failure to join an indispensable party. The Court there stated:

> "Counsel for appellant directs our attention to other cases, where this court proceeded to determine the merits notwithstanding the suits were brought against inferior or subordinate officials without joining the superior. We do not stop to inquire whether all or any of them can be differentiated from the case now under consideration, since in none of them was the point here at issue suggested or decided. *The most that can be said is that the point was in the cases if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.*" 266 U.S. at 511 (emphasis added).

As appears from this review, Reiter is unable to marshall any significant support in the case law warranting an expansion of consumer standing to sue under Section 4. In fact, the overwhelming weight of authority cuts the other way. Those cases which have come to grips with the "business or property" language rather uniformly have concluded that it refers to "commercial interests or enterprises". Accordingly, the

ordinary consumer for personal use, who asserts no such interest, is not injured in "business or property".

III. THE LIMITATION OF "BUSINESS OR PROPERTY" TO COMMERCIAL INTERESTS OR ENTERPRISES IS CONSISTENT WITH JUDICIALLY RECOGNIZED POLICIES ON THE PRIVATE RIGHT OF ACTION FOR DAMAGES UNDER THE ANTITRUST LAWS.

Courts have recognized that the treble damage remedy of Section 4 "superimposes a penalty upon compensation" and thereby provides a potential "windfall" to plaintiffs. *Conference of Studio Unions v. Loew's Inc.*, 193 F.2d 51, 55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952); *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, 147 F.Supp. 907, 909 (D. Mass. 1956); *Harrison v. Paramount Pictures, Inc.*, 115 F.Supp. 312, 317 (E.D. Pa. 1953), *aff'd* 211 F.2d 405 (3d Cir. 1954). They also have noted that overbroad extension of the field of potential treble damage claimants could entail massive burdens on the administration of justice and thereby impair the effective enforcement of the antitrust laws. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Therefore, the courts have been scrupulous not to expand this extraordinary remedy beyond the limits plainly required by the language, history and purposes of the Act.

Arguments that noncommercial consumers must have standing to provide a "deterrent" for antitrust violations and to compensate potential plaintiffs do not justify now including noncommercial purchasers within the "business or property" limitation of Section 4. It has never been held that alleged antitrust violators must be required to pay damages to every party allegedly injured. *Illinois Brick Co. v. Illinois*; *Hawaii v. Standard Oil Co.*, 405 U.S. at 262 n.14. Moreover while it may generally be assumed that the preservation of competition through deterrence of antitrust violations—whether through enforcement by the government or by private commercial interests—will serve the basic policy of protecting the noncommercial consuming public, it does not follow that the drastic remedy of a suit for treble damages, attorneys' fees, and costs must be made available directly to noncommercial purchasers in order to achieve that objective.

On the contrary, there are substantial policy grounds, the importance of which has been judicially acknowledged, for not extending this exceptional remedy to noncommercial plaintiff such as Reiter.

A. The Extension of the Treble Damage Remedy Would Not In Fact Result in Any Significant Additional Benefits to Noncommercial Consumers.

The additional benefits which Reiter and the *Amici* argue would flow from the expansion of standing under Section 4 are essentially illusory. Noncommercial consumer claims like those made here are generally filed as massive class actions which present enormous administrative problems for the courts. These types of cases are seldom, if ever, tried to conclusion on their merits. In those cases that overcome the severe manageability problems of enormous class actions, the amount of recovery to any individual, noncommercial consumer is likely to be insubstantial, the return to attorneys significant. In addition, the costs of such litigation are immense. Expense and delay detract from even a favorable result.

The fallacy of the notion "that the best way to protect consumers under the antitrust laws is through novel procedural devices which would permit very large numbers of small damage claims to be asserted in massive lawsuits" has been documented in Handler & Blechman, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and a Suggested New Approach*, 85 Yale L.J. 626 (1976). While the article is basically addressed to *parens patriae* and fluid recovery proposals, the authors demonstrate that massive noncommercial consumer suits "will neither confer significant benefits on consumers nor provide a workable deterrent for enforcing the antitrust laws in their interest." *Id.* Analyzing the noncommercial consumer class actions that had been filed, the authors stated:

> "As noted by Judge Medina in *Eisen v. Carlisle & Jacquelin* [479 F.2d 1005, 1018-19 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974)], 'not a single one of these class actions including millions of indiscriminate and unidentifiable members has ever been brought to trial and decided on the merits.' In some instances consumers were found to have suffered no compensable injury. In other instances the courts refused to certify classes because, among other defects, the sheer burden of processing millions of small claims through discovery and trial rendered the actions unmanageable. What is more, the supposed benefits to individual consumers were often so inconsequential that in the view of some courts the attorneys rather than the class members constituted the real parties in interest." *Handler & Blechman, supra*, at 628-29 (footnotes omitted).

The indirect costs to the American public of massive litigation also cannot be ignored. The litigation expenses for defendants, whether large or small, are often immense. This is generally true whether or not the claims are meritorious. Many of these costs are tax-deductible and, thus, the taxpaying public bears a part of the burden of litigation expense. Ultimately, any increase in the expenses of a business is reflected in the prices that are charged to its customers, whether other businesses or noncommercial consumers.

B. Any Possible Benefits to the Noncommercial Consuming Public Would Be Outweighed by the Added Burden on the Administration of Justice.

Even assuming that some benefits might accrue to members of the noncommercial consumer public, as distinguished from the attorneys, by extending the "business or property" limitation as argued by petitioner, these minimal benefits are far outweighed by the added burdens on the administration of justice. The great majority of, if not all, noncommercial consumer cases are brought as class actions, but class actions for damages by masses of small noncommercial purchasers of consumer goods present enormous problems of manageability, adequate representation, determining the real party in interest, notice to class members, ascertainment of damages, and superiority of class action to other remedies. These unwieldy consumer class actions in a practical sense impose a heavy burden on the judicial system and contribute greatly to the overloading of the courts. This serious overload is not a problem for the courts alone, but also a serious problem for litigants who seek justice.

The respondents are not suggesting that where Congress has unequivocally granted jurisdiction, the courts should not

accept consumer class actions because they would further strain already heavily burdened dockets. Rather, the point is that the courts may properly consider impact on the judicial system in determining whether Congress intended to confer the asserted right to sue.

This was precisely the approach recently taken in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). In holding that indirect purchasers are not entitled to maintain an action for treble damages under Section 4, this Court recognized that such purchasers may be injured by antitrust violations to the same, or even greater extent, than direct purchasers. Nevertheless, consideration of the massive litigation and administrative burdens that would almost inevitably arise out of actions by indirect purchasers — and the resulting, adverse impact on the effective enforcement of the antitrust laws — led this Court to conclude that the treble damage action should appropriately be limited to actions by direct purchasers.

Many of the pragmatic considerations which led in part to the result in *Illinois Brick* are present in this case. Reiter's complaint encompasses a potential class of millions. She charges restraints affecting thousands of dealers. To assess the damages attributable to alleged anticompetitive activity by the respondent-manufacturers would require analysis of multi-tiered distribution channels comprised of manufacturers, independent dealers, and retail consumers. Further complicating this case are the claims of vertical dealer restraints which dominate the complaint and require analysis under the "rule of reason". *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). This is far more than a price-fixing case— its dimensions are staggering.

C. Existing Remedies Adequately Deter and Penalize Antitrust Violators.

The realistic limitation inherent in Section 4 has not and will not seriously hamper antitrust enforcement. Congress has provided other, adequate remedies as well as a strong deterrent to, and penalty for, antitrust violations.

The United States can bring criminal actions against individuals and corporations for violations of the antitrust laws. Each offense is now a felony, punishable by up to three years imprisonment and a fine of up to one hundred thousand dollars for individuals and one million dollars for corporations. 15 U.S.C. §1 (1976). In addition, the United States can bring civil actions for injunctions, enforceable by the court's potent contempt power, to prevent future violations. The Federal Trade Commission, acting under 15 U.S.C. §45 (1976), can also initiate civil actions against persons who engage in antitrust violations. Indeed, the present complaint is virtually a copy of the complaints filed against each of the respondent-manufacturers by the Commission several years ago.

Enforcement against antitrust violations is not confined to actions by the federal government. Many states have enacted statutes outlawing activities which would be in violation of the Sherman and Clayton Act provisions. These statutes often contain both civil and criminal penalties.[36]

Noncommercial consumers themselves have a direct remedy under Section 16 of the Clayton Act which authorizes suits for injunctive relief. This provision does not contain the commerical interest limitation of Section 4 and, thus, there is no question that a noncommercial consumer has standing to

[36] *See, e.g.*, Minn. Stat. §325.8018; Mo.Rev. Stat. §416.051; N.Y. Law, Ch. 20, Art. 22 (Consol.); Tex. Bus. & Com., Title 2, §§15.32, 15.33; Wis. Stat. §133.01.

sue.[37] Since the recent authorization of attorneys fees for such injunctive suits, there is incentive for the bar to undertake them, notwithstanding the lack of monetary awards. 15 U.S.C. §26 (1976). Given the enormous costs of litigation and the potential costs and competitive disadvantages of compliance with broad court orders, injunctive suits can have a substantial deterrent effect.[38] Moreover, injunctive suits are much more easily and quickly handled than massive retail consumer class actions because there are no damage claims to administer and determine and the numbers of plaintiffs can be kept small. There is, therefore, once again sound policy from the standpoint of the administration of justice to have a narrower standing criterion for damage actions than for injunctive suits.

Yet another enforcement tool is the *parens patriae* suit by a state attorney general for treble damages on behalf of a state's noncommercial consumers. This cause of action was created by Congress as part of the Antitrust Improvement Act of 1976, 15 U.S.C. §15c-h (1976), in order to permit a state to secure monetary relief on behalf of its natural citizens for injuries sustained by them as a result of antitrust violations. The *parens patriae* suit resolves the problems of manageability, damage duplication, and damage distribution inherent in

[37] *See* n.5, *supra*.

[38] This Court has been cited to a draft of a study on deterrence and a letter by one of the authors of that study. Block, Nold and Sidak, *The Deterrent Effect of Antitrust Enforcement: a Theoretical and Empirical Analysis*, Hoover Institution Technical Report ISDDE-1-78 (December 1978 Draft) and Brief for Petitioner, Add-1. The paper develops a simple model of collusive behavior with regard to price markups, making several assumptions about business activity. The model is discussed mathematically, but the empirical work done by the authors relates only to the white bread industry. The data is all taken from a time period before courts began imposing the significant, increased criminal antitrust penalties provided for in the 1974 amendments to 15 U.S.C. §1.

cumbersome class actions. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); Scher, *Emerging Issues under the Antitrust Improvements Act of 1976*, 77 Colum. L.Rev. 679 (1977).

Affirmance of the court below would not undercut the effectiveness of the *parens patriae* device. In the Antitrust Improvements Act of 1976, Congress apparently sought to create a *new* cause of action for the nonbusiness consumer. S.Rep. No. 803, 94th Cong., 2d Sess. 42 (1976); 122 Cong. Rec. S15, 417 (daily ed., Sept. 8, 1976). Indeed, the *Amici* States concede as much. See Brief for the States at 21-22.[39]

In light of the foregoing, there is no rationale for expanding Section 4 to grant noncommercial consumers the right to sue for treble damages.[40] Potential antitrust violators already face sufficient penalties to deter their illegal activities.

[39] Even if affirmance of the court below were to undermine in some manner the new *parens patriae* device, that would hardly constitute good reason to expand the "business or property" limitation in Section 4 of the Clayton Act deliberately chosen by Congress in 1890 and subsequently recognized by the courts. As this Court noted in *Illinois Brick*, the 1976 Act did not alter the definition of injured persons under Section 4, and the views of Congress in 1976 as to the scope of that section are not dispositive with respect to the intent of Congress in enacting Section 7 in 1890 or Section 4 in 1914. 431 U.S. at 733, n.14.

[40] Many of the cases in which noncommercial consumer classes have been certified or conditionally certified also involved substantial classes of persons alleging commercial injury. *E.g.*, In re Ampicillin Antitrust Litigation, 55 F.R.D. 269 (D.D.C. 1972); West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir. 1971), *cert. denied* 404 U.S. 871 (1972); Cusick v. N.V. Nederlandsche Combinatie Voor Chemische Industrie, 317 F.Supp. 1022 (E.D.Pa. 1970). Thus, even these "consumer" cases would still have been maintained without the noncommercial classes.

D. Whether to Expand Section 4 Standing to Noncommercial Consumers Is a Task for Congress, Not for the Court.

The language of Section 4 and the legislative history mandate a finding that only those persons injured in their commercial interests or enterprises have standing to sue for violations of the antitrust laws. Whether Section 4 should be expanded to encompass noncommercial retail purchasers is a matter for Congress and not for this Court.

To the extent Section 4 might ever warrant revision, the substantial economic and policy ramifications of now granting standing to noncommercial consumers make congressional review appropriate. As Mr. Justice Powell noted in *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978):

> "A court, without benefit of legislative hearings that would illuminate the policy considerations if the question were left to Congress, is not competent in my opinion to resolve this question in the best interest of our country." *Id.* at 331 (Powell, J., dissenting).[41]

[41] Since this Court's decision in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), committees of both the 95th and 96th Congresses have been considering legislation which would allow indirect purchasers to sue. Eleven bills were introduced in the two Chambers during the 95th Congress, and at least four have been introduced thus far in the present Congress. As of March 2, 1979 there had been 15 days of committee hearings, 116 witnesses, and 1,291 pages of printed hearing reports on the so-called Illinois Brick amendments. Some of the most recently proposed bills, *e.g.*, S.300, 96th Cong., 1st Sess., introduced by Senator Kennedy, would provide that "Any purchaser . . . in the chain of . . . distribution of goods or services shall, upon proof of payment . . . of any overcharge . . . be deemed to be injured within the meaning of Section 4, 4A, or 4C of this Act. . . ." If adopted, this bill would appear to extend the treble damage remedy to noncommercial purchasers—something which only Congress can do.

If existing remedies are inadequate to protect noncommercial consumers, it is for Congress to provide a solution. It is not within the province of a court to change significantly a legistive enactment to satisfy its own ideas of sound public policy.[42]

CONCLUSION

The judgment of the Court of Appeals for the Eighth Circuit should be affirmed.

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[42] cf. In re Hotel Telephone Charges, 500 F.2d 86, 91-92 (9th Cir. 1974); Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. 1974, *cert. denied* 421 U.S. 963 (1975).

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